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No. 06-1444

In the Supreme Court of the United States

UNION PACIFIC RAILROAD COMPANY,
Petitioner,

v.

TIMOTHY P. HEDGECORTH,
Respondent.

On Petition for a Writ of Certiorari to the Missouri Court of Appeals

PETITIONER'S REPLY BRIEF

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RULE 29.6 STATEMENT

Union Pacific Railroad Company states that it is a wholly owned subsidiary of Union Pacific Corporation and Southern Pacific Rail Corporation. Southern Pacific Rail Corporation is a wholly owned subsidiary of Union Pacific Corporation. Dodge & Cox is the only publicly held company that owns ten percent or more of the stock of Union Pacific Corporation.

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MISSOURI APPROVED JURY INSTRUCTIONS
(6th ed. 2002) 1, 7

The notion that state pattern jury instructions are immune from scrutiny by this Court is simply not true. As recently as this year and as early as twenty-two years ago, the Court held that the Missouri Approved Instructions did not properly advise the jury of the substantive law to be applied in cases brought under the Federal Employers Liability Act, 45 U.S.C. §§ 51 *et seq.* ("FELA"). *See Norfolk & Southern Railway Co. v. Sorrell*, 549 U.S. ___, 127 S.Ct. 799 (2007); *St. Louis Southwestern Railway Company v. Dickerson*, 470 U.S. 409, 411-12 (1985). The Missouri Supreme Court itself amended the very pattern instruction at issue because it failed to properly submit the substantive law, once in response to *Dickerson* (adding a provision regarding reduction of future damages to present value) and once in response to *Norfolk & Western Railway Co. v. Liepelt*, 444 U.S. 490 (1980)(adding a provision informing the jury that any damages it may award are not subject to income tax). *See* Notes on Use (1996 Revision) and Committee Comment (1996 Revision) to MAI 8.02, MISSOURI APPROVED JURY INSTRUCTIONS (6th ed. 2002) at 108-109.

This petition is not concerned with whether the FELA permits recovery for fear of cancer. Rather, the question here is whether state court pattern jury instructions must explicitly convey the requirements of the governing federal substantive law as declared in *Norfolk & Western Railway Company v. Ayers*, 538 U.S. 135 (2003). Underlying the Court's conclusion on the substantive law was the principle that the jury must be properly instructed as to what the substantive law is. The petition presents the next logical question — whether federal law *requires*, "on a defendant's request, a charge that each plaintiff must prove any alleged fear of cancer to be genuine and serious." *Id.* at 159 n.19.

Petitioner Union Pacific Railroad Company sought jury instructions that would have directed the jury to make such findings as a predicate to an award of damages for fear of cancer, but the trial court refused them. None of the instructions actually given expressly addressed the substantive law applicable to a fear of cancer claim. The Court should grant review to decide whether the FELA mandates such an express instruction.

I. INSTRUCTIONS IN A FELA CASE MUST REFLECT THE FEDERAL SUBSTANTIVE LAW INCLUDING *AYERS'* "GENUINE AND SERIOUS" REQUIREMENT

Respondent's principal argument — that *Ayers* "did not pertain to jury instructions," Resp. Br. 3-5 — misses the mark. One can only come to that conclusion by putting blinders on. *Ayers* held that a FELA plaintiff with an actionable injury may recover damages for fear of cancer, subject to the "important reservation" that he "prove that his alleged fear is genuine and serious." 538 U.S. at 157-58. The question here is whether federal law requires the jury to be told that they may award damages for fear of cancer only if they find as a fact that the alleged fear meets that standard.

The function of jury instructions is to tell the jury what facts the parties must prove. In response to concerns that there would be jury speculation as to the proper compensation for fear of cancer damages, *Ayers* emphasized that trial courts, "on a defendant's request" ought to "charge [the jury] that [the] plaintiff must prove any alleged fear to be genuine and serious." *Id.* at 159 n.19. Respondent's suggestion that *Ayers* only requires such jury instructions when there are multiple plaintiffs, Resp. Br. at 4, is a misreading of the

opinion. Properly instructing the jury is vital regardless of the number of plaintiffs.

Respondent concedes, as he must, that parties in FELA cases are entitled to jury instructions that fully and accurately convey the requirements of the governing federal substantive law. Resp. Br. 9. *See, e.g., Chesapeake & Ohio Railway Company v. Kelly*, 241 U.S. 485, 491 (1916); *Dickerson*, 470 U.S. at 411-12; *Monessen Southwestern Railway Company v. Morgan*, 486 U.S. 330, 335, 342 (1988). Yet, nowhere does he explain why or how MAI 8.02 informed the jury of the federal substantive law that damages for fear of cancer should be awarded only if the jury found the fear to be "genuine and serious."

MAI 8.02, quite simply, does not do this. The instruction the trial court gave, based on MAI 8.02, did not inform the jury that fear of cancer, as a species of negligently inflicted emotional distress, was a distinct element of Respondent's alleged damages. *See* Pet. App. 80a. Nor did the instructions describe the "injury" at issue or inform the jury, consistent with *Ayers'* command, that a plaintiff is only entitled to fear of cancer damages if he or she proves his or her fear is "genuine and serious." *Id.* Contrary to *Ayers'* unmistakable language, the general instruction given allowed the jury to award fear of cancer damages for any expression of concern on Respondent's part, even if it believed his concerns were insignificant or uncorroborated by objective evidence.[1] *Id.*

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[1] Respondent does not dispute that an instruction conveying *Ayers'* "genuine and serious" requirement is particularly important in non-malignant cases, such as his, in light of the large and growing number of non-malignant claims entering the system. *See* Resp. Br.; Pet. 16.

Respondent's only argument that the trial court "properly refused" Union Pacific's instructions is to parrot the Missouri Court of Appeals opinion that *Ayers* "did not discuss or authorize jury instructions. . . . [and] [s]ince the form of instructions is a matter of Missouri law, the *Ayers* holding does not require a change in the form of approved MAI instructions." *Id.* at 2, 4 (citing Pet. App. 19a); Resp. Br. 2.

Of course, *Ayers did* discuss the use of jury instructions in "fear of cancer" cases. In response to the dissent's concern that allowing claims such as this will lead to unbridled speculation by juries and possible bankruptcy of target defendants, the Court expressly identified jury instructions — such as those requested here by Union Pacific — as a verdict control device to cabin awards to claims where the jury found the alleged fear to be both genuine and serious. 538 U.S. at 159 n.19.

Moreover, even though the precise wording of such an instruction was not the primary issue before the Court in *Ayers*, it is well-settled that jury instructions must reflect the federal substantive law with respect to damages. *Kelly*, 241 U.S. at 491; *Dickerson*, 470 U.S. at 411. State procedural rules with respect to the form of jury instructions do not impinge on this maxim. *See Dickerson*, 470 U.S. at 411-12.

Nor is Union Pacific's reading of *Ayers* "novel," as Respondent claims. Resp. Br. 3, 7. It is hardly a leap of faith to extend *Ayers'* establishment of the prerequisites for a fear of cancer claim in a FELA case to a requirement that the jury be instructed in accordance with the substantive elements of the law — namely, on its "genuine and serious" requirement. *See Kelly*, 241 U.S. at 491; *Dickerson*, 470 U.S. at 411. Kansas, for example, has incorporated the *Ayers* principle into its pattern instructions, entitling a defendant to

an instruction that a plaintiff must prove that any alleged fear was "genuine and serious." *See* KS-PIKCIV § 132.20.

Respondent's argument that that he presented sufficient evidence to recover damages for fear of cancer likewise misses the point. Resp. Br. 5-6. The courts below did not refuse the proffered instructions because there was sufficient evidence to support Respondent's claim or because there was no evidence to support Union Pacific's contention that Respondent's alleged fear of cancer was neither genuine nor serious. *See* Pet at 5. Even where a plaintiff makes a submissible case, the defendant is entitled to instructions that properly put the issues before the jury.

None of the post-*Ayers* decisions cited by Respondent address this specific issue, nor do they hold that a jury instruction concerning the measure of damages in a FELA case is proper, even though it did not submit the essential findings necessary under the federal substantive law to award damages for fear of cancer. The Court should grant the petition to decide whether federal law requires that a jury be instructed on the "genuine" and "serious" elements of a fear of cancer claim, even if a state's pattern instructions have no such constraint. Pet. App. 17a-18a; *Dickerson*, 470 U.S. at 411-12.

II. THE INSTRUCTIONS TENDERED BY UNION PACIFIC WERE SUPPORTED BY THE EVIDENCE AND SUBSTANTIALLY FRAMED IN THE LANGAUGE OF *AYERS*

Respondent also claims that Union Pacific's instructions contradicted this Court's opinion in *Ayers*. The instructions tendered by Union Pacific were supported by the evidence and framed substantially in the language of *Ayers* and the

decisions of other courts which establish the circumstances under which a plaintiff may recover damages for a fear of cancer claim.

Respondent's contention that review is unnecessary because Union Pacific's instructions asked the jury to decide whether a "fear of cancer is an 'actual injury'" is not sustained by the record. Resp. Br. 7. The Court decided that legal issue in *Ayers*, subject to the important reservation that the claimant's fear must be "genuine and serious." *Ayers*, 538 U.S. at 141, 157-58. Rather, the proposed instructions required the jury to affirmatively find certain ultimate facts essential to a finding that Respondent had a "genuine and serious" fear of cancer, *i.e.*, an actual injury as defined by this Court. *Id.*; Pet. App. 81a-84a.

Furthermore, Respondent incorrectly claims that any physical symptoms of his alleged fear "were unimportant to a fear of cancer [claim] already deriving from the medical diagnosis of asbestosis[.]" Resp. Br. 8. A "genuine and serious" fear, according to *Ayers*, amounts to more than a "general concern for [one's] future health" and the fact finder may consider the absence of physical symptoms as evidence that the injury "'is less severe and therefore less deserving of a significant award.'" *Id.* at 157-58 & 158 n.17 (citing *Smith v. AC and S, Inc.*, 843 F.2d 854, 859 (5th Cir. 1988) in which a "'general concern for [one's] future health' [was] held insufficient to support recovery for an asbestosis sufferer's fear of cancer").

Evidence that an individual has more than a general concern for his or her health in addition to demonstrable physical symptoms has long been the benchmark for recovery of emotional distress damages. *See Carey v. Piphus*, 435 U.S. 247, 264 n. 20 (1978); *Foreshee v. Waterloo Industries,*

Inc., 178 F.3d 527, 531 (8th Cir. 1999); *DeNieva v. Reyes*, 966 F.2d 480, 487 (9th Cir. 1992).[2] The language used in the tendered instructions is taken from these decisions and tracks the requirements established by the caselaw. The omission of this language would allow any person who has been diagnosed with asbestosis to recover damages for fear of cancer regardless of whether he or she has any concern, much less a "genuine and serious" concern, that cancer may develop. This is not what the Court intended in *Ayers*. 538 U.S. at 157-58, 159 n.19.

Respondent's claim that the error, if any, was harmless also cannot be sustained. Resp. Br. 8. Jury instructions are supposed to provide meaningful guideposts that inform a jury of laypersons what the applicable law is. Instructions aren't supposed to be just a rote lecture on the law or a statement of abstract principles, but a practical tool to help juries reach important and often difficult decisions as to liability and damages. If the jury is not told the proper legal principles that should govern its decision, and the facts they need to find to render a verdict for either a plaintiff or a defendant, then how can we have any confidence that the jury resolved the case correctly?

Finally, simply because Union Pacific's counsel was left to making arguments about the factual issues related to the "genuine and serious" requirement in his closing does not foreclose this Court's review. Resp. Br. 9. Any experienced

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[2] We note that the Missouri Approved Instruction for such claims under state law require the jury to find that the "plaintiff sustained medically diagnosable and significant emotional distress." *See* MAI 31.23 [2000 New], MISSOURI APPROVED JURY INSTRUCTIONS at 494.

trial lawyer knows that a judge's instructions bear a stamp of legitimacy regarding the applicable law that lawyers cannot match (and, indeed, it would be error for them to contradict). Few instructional errors have greater significance in a trial than the court's refusal to instruct on a core element of the plaintiff's case. It is the court's responsibility to see that the jury receives the proper guidance on the law for its deliberations. Whether the jury received correct guidance is the essence of the petition.

CONCLUSION

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted. Alternatively, this Court may wish to consider summarily reversing the decision below.

Respectfully Submitted,

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